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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

JAMES MADISON LIMITED,
By Norman F. Hecht, Sr., Assignee,
PETITIONER,

v.

EUGENE A LUDWIG, COMPTROLLER OF THE CURRENCY, OFFICE OF THE COMPTROLLER OF THE CURRENCY and FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

William Joseph H. Smith
Counsel of Record
Stohlman, Beuchert, Egan
& Smith, Chartered
1775 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 452-1775

Counsel for Petitioner

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REPLY BRIEF OF PETITIONER

The argument of the Comptroller, OCC and FDIC (together referred to as the "Comptroller") in opposition to the Petition for Writ of Certiorari demonstrate the need for this Court to provide to the Executive Branch of the Federal Government, through its review of this case, judicial guidance for the implementation of the requirements of due process during an informal administrative agency adjudication that results in a taking of private property, and particularly to the Comptroller when he appoints a receiver to liquidate the assets of a bank.

ATTEMPT BY COMPTROLLER TO REDUCE DUE PROCESS REQUIREMENTS

The Comptroller attempts to reduce the requirements of due process notice by equating due process notice with (i) the regulators' expressions of doubts about the Bank loan loss methodology; (ii) the regulators informing the Banks that they intended to focus the upcoming examination on the adequacy of the loan loss reserves; and (iii) the conclusion of the Appellate Court that the Banks "were clearly on notice that they might be declared insolvent." Brief For The Respondents In Opposition ("Br. Res.") 5. The Comptroller, in his argument, as the Court of Appeals did in its opinion, ignores that due process requires the government to give a party notice of the action being taken or decision being made that will deprive him of this property, the reasons for the action or decision and the manner and time within which the party has the opportunity to be heard. *Mullane v. Central Hanover Trust*, 339 U.S. 306, 313 (1950). Although the Banks were provided with a draft of a spread sheet toward the end of the examination period, that listed the reserves that the examiners considered requiring for the pertinent loans, the Banks were never given notice of any of the reasons or evidence that the examiners

allege supported the additional loan loss reserves,[1] nor did the Banks receive notice of any opportunity to present their evidence and arguments contesting the amount of the reserves for consideration by the Comptroller or examiners and for inclusion in the Administrative Record.

The Comptroller attempts to reduce the hearing requirements of due process when he contends that the Banks were given a meaningful opportunity to present their case to the regulators before the Banks were declared insovlent and placed in receivership. Br. Res. 5. The Comptroller attempts to equate a meaningful opportunity to present evidence and arguments with (i) two meetings of Bank officers and their accountants with senior officials of the OCC to complain about the manner in which the examination was being conducted; (ii) the meetings of Loan officers with the examiners to discuss 44 of the loans and the preparation of short discussion memorandum for those loans, which loans comprised less than 44% of the loans for which the examiners assessed $100,000.00 or more in additional reserves; (iii) the two lists classifying loans prepared by the examiners on which the Banks indicated their agreement with only 31% of the classifications for the loans listed stating that they reserved their right to contest the allocation of reserves, C.A. App. A183-A195; (iv) the memorandum submitted to the examiner-in-charge objecting to the use of the migration formula; (v) the meeting called by OCC, FDIC and Federal Reserve senior officials to advise the Banks' directors of the total amount of additional reserves required that made the Banks insolvent; (vi) the nine days the OCC senior officers provided the banks to submit a satisfactory recapitalization plan; and (vii) the recapitalization

[1]Bank loan officers did receive from the examiners 17 drafts of loan write-ups for 17 loans that constitute less than 17% of the pertinent loans for which the examiners assessed an additional $100,000.00 or more in reserves.

plan submitted by the Banks. The Comptroller never describes, nor points to any documents in the Administrative Record that shows, when he or the examiners gave the Banks the opportunity to present their evidence and arguments contesting the additional loan loss reserves for the pertinent loans, or when the Banks were given the opportunity to respond to the reasons or evidence of the examiners that they allege supported the additional loan loss reserves they required for the pertinent loans, or the time or manner in which the Banks could respond, because it never happened.

The Comptroller wrongfully attempts to justify his argument that the actions of the Banks and OCC, described in clauses (i) through (vii) in the paragraph above, provided the Banks with due process under the circumstances, prior to the appointment of the receiver, because "the government has a substantial interest in moving quickly to seize insovlent institutions," Br. Res. 7, and because the Banks' interest in a formal pre-deprivation hearing "is not as strong as the public's interest in protecting the stability and integrity of the banking system," Br. Res. 7. Similar reasons have been accepted by the Court in prior cases when circumstances have warranted immediate taking of possession of property, as reasons that justify delaying the due process notice and opportunity to be heard until after the initial taking of possession occurs (see cases discussed in Petition ("Pet.") at 11 and 12), but such reasoning has never been accepted by the Court as justifying reducing the due process requirements of notice and a meaningful opportunity to be heard to warnings of wrongdoing and actions similar to the actions of the Banks and the regulators described by the Comptroller at Br. Res. 5 and 6.

COMPTROLLER ERRONEOUSLY CONTENDS HE IS NOT REQUIRED TO PROVIDE DUE PROCESS NOTICE AND HEARING AFTER RECEIVER APPOINTED

The Comptroller contends that he is not required to provide a bank with a due process notice and the opportunity to present its evidence and arguments to challenge the appointment of a receiver after the receiver is appointed and prior to the receiver disposing of the bank's assets, because of the government's interest in "swiftly disposing of assets and liabilities after a seizure takes place" to ensure "the smooth transfer of a bank's deposits and branches to other institutions" and to "minimize losses for both depositors and taxpayers that could occur if the government had to hold on to a bank's assets when the value of the assets are declining." Br. Res. 8.

First, such reasoning is contrary to and ignores the absolute prohibition and language of the Fifth Amendment — "No person shall be . . . deprived of property, without due process of law." Secondly, there is no evidence in either the Administrative Record or the record of the court that supports the reasoning of the Comptroller and Court of Appeals that swift disposition of the Banks' assets are in the government's and public's best interest. To the contrary, the terms of the Purchase and Assumption Agreements with Signet Bank caused the FDIC and public to incur the expense and loss of the worst case scenario for a bank, i.e., a run on the Bank by depositors demanding withdrawal of all of their deposit funds.

The terms of the Purchase and Assumption Agreements with Signet required the FDIC to pay cash and transfer liquid securities to Signet equal to the amount of the deposit accounts transferred to Signet, less a small discount, with the FDIC retaining all of the "declining" assets, i.e., loans and real estate

for collection or sale. Thus, in lieu of paying each depositor, the FDIC paid Signet Bank the amount of the deposit accounts, with none of the "declining" assets being transferred to Signet.

If the Banks had been operated by the FDIC as a conservator while the Banks were given the opportunity to be heard, the loss the FDIC may have incurred could not have been any more than the payment of all the deposit funds to Signet. In addition, there was no need for the Comptroller and FDIC to rush to dispose of the Banks' assets, since the Banks were not actually insolvent at the time because the additional loan loss reserves required, that made the Banks insolvent, were not for actual losses incurred by the Banks, but were for estimated future losses that had not occurred and may never have occurred.

The Comptroller's argument that JML's position, that the Comptroller may appoint a receiver to liquidate the assets of a bank without a due process hearing, but must provide the bank with notice and the opportunity to present its evidence and arguments contesting the appointment of the receiver before the receiver may dispose of the bank's property, is without precedent, is correct because such due process issue has not previously been before this Court. However, the position is consistent with the language of the Fifth Amendment and consistent with the Court's rulings in prior cases when circumstances warranted the immediate taking of private property by the government and the Court has ruled that due process is satisfied by a post taking notice and hearing before the deprivation of property becomes final. Pet. at 11 and 12. This case warrants the attention of the Court to determine whether the Fifth Amendment requires banks to be afforded the same due process rights that the Court has protected for other parties whose property has been taken immediately by

the government under extraordinary circumstances without prior notice and a hearing.

CONTENTS OF ADMINISTRATIVE RECORD NOT SUFFICIENT FOR JUDICIAL REVIEW

The Comptroller's contention that the Administrative Record was sufficient for judicial review because the record contains "detailed contemporaneous reports from the examiner-in-charge and members of her examination team explaining how and why they reached their conclusions regarding the Bank's reserves," Br. Res. 9, and because "due process does not require *de novo* examination of bank files as a precondition to review of a receivership decision," conflicts with the court's ruling in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

The loan underwriting and credit documents of the Banks for the pertinent loans must be a part of the Administrative Record, not for the purposes of permitting the court to make a *de novo* determination of the facts, but rather to permit the court to make a searching and careful inquiry into the facts to determine whether all relevant factors were considered and whether any clear errors of judgment were made. *Id.* at 416. If the Comptroller or any other agency is allowed to take actions that constitute a taking of private property, based solely upon an Administrative Record, containing only summary reports setting forth factual conclusions and reasons of the agency's employees, without requiring the Administrative Record to include all of the pertinent evidence available to the employees who prepared the summary reports and memoranda, then courts will not be able to test the findings and conclusions set forth in the summary reports to determine if all relevant factors have been considered or whether any errors of judgment were made.

If only summary reports are required to be included in an Administrative Record, regardless of how detailed they are, then judicial review under the Administrative Procedure Act, 5 U.S.C. § 706Z(2)(A), will have little if any capacity to protect individual and corporate citizens against arbitrary government takings of property. The contention of the Comptroller, and the ruling of the Court of Appeals, that detailed reports describing the examiners' findings and recommendations are sufficient for the Court to perform the review necessary to determine whether the agency's decision was proper, is evidence of the need for this Court to review this action so it may exercise its supervisory authority to provide guidance to the lower courts and to provide judicial guidance to the Executive Branch of the Federal Government as to what kind of evidence an Administrative Record must contain in order to support an administrative agency action or decision that constitutes a taking of property and that will enable judicial review to be conducted as instructed by the Court in *Overton Park*.

CONCLUSION

This case merits review by the Court because the issues raised affect the due process rights of all banks that are regulated by the Comptroller and it will affect the due process rights of all parties whose property is taken immediately by the government under extraordinary circumstances.

William Joseph H. Smith
Counsel of Record
Stohlman, Beuchert, Egan
& Smith, Chartered
1775 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 452-1775

Counsel for Petitioner

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